APPEAL NO. 93080

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas on October 6, 1992; was recessed to obtain additional medical evidence; and was closed on January 11, 1993. The appellant, hereinafter claimant, is appealing the determination of (hearing officer), that he did not injure his lower back on (date of injury), while working for his employer and that he failed to prove by a preponderance of the evidence that he sustained a repetitive trauma injury on or about (date of injury). He contends that certain evidence he sought to offer at the hearing was not admitted, thus making it impossible for him to prove that he sustained a repetitive trauma injury or show a causal connection between the injury and his work. The respondent, a self-insured governmental entity (hereinafter employer/carrier) contends the hearing officer committed no error in not admitting the documents in question as not timely exchanged. Even if such were error, employer/carrier argues, it is harmless error because the information in the documents could have come into evidence through testimony.

DECISION

Upon review of the record in this case, we affirm the hearing officer's decision and order.

The claimant testified that he began working for employer/carrier on March 3, 1991. He normally worked from 8 a.m. to 6 p.m., three days a week. His job primarily involved working at the county dump site, where he collected money from individuals who came to use the dump; he did not have to unload the dumped materials himself. However, because this did not take up all his time, he was assigned other miscellaneous maintenance tasks by his supervisor, (NT). He stated that he performed various duties at the county barn relating to maintenance of equipment and vehicles. These included, among other things, sweeping, mopping, greasing vehicles, sanding and painting tanks, and welding, duties which required him to stoop and climb. He was also on occasion required to lift materials such as crossties and motor grader blades.

Claimant testified that he began hurting while at work on March 7, 1992. He reported to his supervisor that he was in pain, and the following week came into work on his day off to say he needed to see a doctor. On April 16th he went to the VA Hospital in (city); on June 6th an MRI confirmed the doctor's suspicions that claimant had a slipped disk in his back. Medical records in evidence show he had an L4-5 diskectomy on July 10th. The records also disclose a two-month history of progressive "foot drop" and pain over the right lower extremity. At the hearing the claimant testified he has little problem with his back, but that he cannot control his leg and is required to wear a support.

The claimant stated that he originally assumed his problem was bursitis, which was ruled out. He said his doctor questioned him in detail about what he did at work, and said that the doctor concluded it was his work that led up to the injury. The claimant said he did

not know of a single incident that caused his back injury; that he had fallen in July of 1991 and bruised his ribs, but had lost no time from work, and his doctor did not think that fall had caused this injury. Claimant believed the strenuous and repetitious nature of the tasks he was required to do were the cause of his problem.

Claimant's supervisor, Mr. T, confirmed the types of tasks claimant performed on the job, but stated that in his opinion they were not strenuous or repetitious.

The claimant stated that the only heavy type work he performs is on the job. He said occasionally he repairs televisions for people, which may require stooping and bending, but that he does no lifting in conjunction with that work.

The claimant in this case was not contending he had suffered an accidental injury which, to be compensable must be the result of an undesigned, untoward event traceable to a definite time and place involving a risk of the employment. Hartford Accident and Indemnity Company v. Olson, 466 S.W.2d 373 (Tex. 1971). Instead, claimant is contending that his injury arose from his work in general, and the fact that the tasks he performed were repetitious and strenuous. The 1989 Act provides that "injury" includes occupational disease, defined as a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. Article 8308-1.03(27), (36). "Occupational disease," in turn, includes repetitive trauma injuries, defined as damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Article 8308-1.03(39). While the statutory language recognizes that an occupational disease develops gradually, with its specific cause and exact time of incidence not always being clear, in order to recover for an occupational disease caused by repetitious, physically traumatic activities an employee must not only prove that the activities occurred on the job, but also prove that a causal link existed between the activities and the incapacity. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). As with any workers' compensation claim, it is the claimant's burden to establish causation. Martinez v. Travelers Insurance Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ).

In Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied), the appeals court affirmed a determination that the claimant's ruptured disk was causally connected to repeated bending and twisting over a low ironing board. The court noted testimony concerning the repetitive nature of the work and the fact that moving the claimant to a low ironing board coincided with the onset of her symptoms; it also noted medical testimony to the effect that these activities could cause or aggravate a disk condition. The Appeals Panel distinguished the facts of the Ramirez case in Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, wherein a claimant alleged his low back problems were caused or contributed to by poor

seating conditions at work. The panel in that case noted "a distinct lack of evidence of repetitive, physically traumatic activities" of the nature found in Ramirez and other similar cases.

The alleged injury in this case is somewhat between these two extremes. Both claimant and his supervisor testified as to the various tasks claimant performed, which appeared to range from those with a greater degree of physical demands (stooping, lifting, etc.) to those with practically no physical requirements (accepting money at the county dump). Claimant testified that he could pinpoint no single incident which caused his problem, but that his doctor surmised it was caused by work. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of its weight and credibility. Article 8308-6.34(e). The testimony of a claimant may be probative evidence in establishing whether a compensable injury occurred; however, the hearing officer is not required to accept a claimant's testimony but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The decision of the hearing officer will be set aside only if the evidence supporting his determination is so weak or against the great weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Upon review of the record from this hearing, we do not find this to be the case.

We also do not find as error any exclusion from the evidence of documents concerning tasks assigned to claimant, as both claimant and his supervisor testified at length as to the nature and types of jobs claimant performed.

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge